

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHWESTERN LUMBER COM-
PANY, a corporation,
Appellant,

VS.

GRAYS HARBOR & PUGET SOUND
RAILWAY COMPANY, a corpora-
tion, OREGON AND WASHING-
TON RAILROAD COMPANY, a
corporation, OREGON-WASHING-
TON RAILROAD & NAVIGA-
TION COMPANY, a corporation,
and CHICAGO, MILWAUKEE &
PUGET SOUND RAILWAY COM-
PANY, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

Brief of Appellant

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NOTE:—All page references are to the printed transcript. The appellant was complainant in the District Court. The words complainant and appellant are used to designate the same party. By the words "Lumber Company," the appellant, Northwestern Lumber Company, is meant. By the words "Railway Company," the defendant and appellee, Grays Harbor & Puget Sound Railway Company, is meant.

STATEMENT OF THE ISSUES.

The Bill of Complaint is based upon a contract between the complainant, Northwestern Lumber

Company, and the defendant Grays Harbor & Puget Sound Railway for the purchase of certain land in Hoquiam. The contract consists of a letter written by the Lumber Company to the Railway Company offering to sell and naming the price, covering three alternative propositions with descriptions sufficient for identification and specifying certain conditions of use for railway purposes (pp. 5-7). One of these propositions is accepted by letter with a collateral provision relating to the complainant's co-operation in securing franchises from the city. The deal was not conditioned upon the granting of the franchises. The co-operation asked for involved matters subsequent to the consummation of the purchase, not as a condition but a covenant.

The defendants Oregon and Washington Railway Company and Oregon-Washington Railway & Navigation Company each in turn purchased the rights and contracts of the company it succeeded and assumed the obligation to perform prior contracts.

All the defendants rely upon the same defenses summarized as follows: (1) No binding contract was ever consummated because (a) the written memorandum is not sufficiently complete to enable a court to ascertain its terms; (b) because it contemplated the execution of a formal document expressing the agreement of the parties, which was never signed by the Railway Company. The answers further set up the defense that the complainant refused

to enter into a formal contract according to the terms of the memorandum and finally refused to convey at the price named in the memorandum. Delay in bringing the suit is also tendered as a defense. Issue was made upon all of the affirmative defenses.

The District Court held on demurrer that the Bill of Complaint was sufficient. (P. 33.) On the trial presided over by another Judge, the complainant was held to have been at fault in refusing to comply with the terms of the contract. (P. 60.)

The memorandum of acceptance by the Railway Company of the Lumber Company's proposition, to which both parties gave their written approval, contained the following sentence:

“You shall give us your co-operation in
procuring * * * franchises in Ho-
quiam.”

Also the following:

“A formal agreement shall be entered into pending actual transfers.”

The draft of the formal agreement prepared by the Railway Company contained the following:

“It is agreed by the first party” (Lumber Company) “and their officers that they will co-operate with the said second party” (Railway Company) “in procuring such franchises of the City of Hoquiam *as it may desire.*” (P. 17.)

The Lumber Company caused to be added the following sentence:

“It is also further stipulated by the party of the first part” (Lumber Company) “that such bridge” (referring to a proposed bridge on Simpson Avenue, mentioned elsewhere in the contract) “*may* be a joint user bridge with the City of Hoquiam, provided the City of Hoquiam contributes its share to the cost of construction and maintenance.” (P. 17.)

The document was re-written with the incorporation of this sentence proposed by the Lumber Company and signed by the Lumber Company in that form. The Railway Company objected, when the document was presented to them for signature, to the sentence added at the instance of the Lumber Company, and requested that it be stricken out, which request was denied.

The District Court held that the Lumber Company was at fault for not acquiescing in the request of the Railway Company to strike the sentence. The District Court held that the three sentences above quoted should be construed without taking into consideration any of the circumstances and conversations tending to show the subject to which they applied and all evidence offered tending to show the plans and structures contemplated at the time and before the memorandum was signed, to aid in construing the language in the light of surrounding circumstances should be disregarded. The exclusion from consideration of this testimony is alleged as

error.

The District Court held that the sentence used in the memorandum.

“You shall give us your co-operation in procuring franchises in Hoquiam,”

and the words proposed by the Railway Company in the formal agreement,

“It is agreed by the first party” (Lumber) Company “and their officers that they will co-operate with the said second party” (Railway Company) “in procuring such franchises of the City of Hoquiam as it may desire,”

expressed in equivalent terms the same obligation.

In this construction placed upon the two clauses by the Court, even without the aid of surrounding circumstances, the District Court erred.

The District Court construed the qualification added at the instance of the Lumber Company,

“It is also further stipulated by the first party” (Lumber Company) “that such bridge may be a joint user bridge with the City of Hoquiam, provided the City of Hoquiam contributes its share to the cost of construction and maintenance,”

as meaning an absolute undertaking on the part of the Railway Company, on the conditions stated, to build a joint bridge. This construction, even without the aid of surrounding circumstances and conver-

sations shown by the parol evidence was error. The context affords no basis for construing the word “may” into “shall.” On its face the language expresses a consent. The evidence shows such was the intention.

The Lumber Company declined to cut out of the proposed formal agreement the stipulation consenting to a joint bridge. The Railway Company then requested that the execution of a formal agreement should be delayed pending an adjustment with the City which might result in eliminating the point in dispute as immaterial. This request for postponement was granted. The District Court held that acquiescence in the request of the Railway Company to postpone the execution of the formal agreement amounted to a postponement of the time of payment for the land, and in consequence the Lumber Company was not entitled to interest from the time when the money was payable under the contract to the date when the Railway Company was ready to perform and pay the money. This holding of the District Court was error.

The District Court held that assuming the original memorandum constituted a binding contract between the parties and its efficiency as a contract was not impaired through fault of the Lumber Company, the Railway Company was released from the obligations of the contract by its offer to pay the contract price without interest for the land on Sep-

tember 10, 1910, and that the refusal of the Lumber Company to accept the contract price without interest amounted to a rescission of the contract, even though the Lumber Company in good faith may have considered itself entitled to interest. In that holding the District Court erred.

The District Court erred in holding that the Lumber Company was not entitled to reimbursement of its expenditures in the performance of the contract, and in the dismissal of the Bill.

STATEMENT OF THE EVIDENCE.

The City of Hoquiam lies on the north side of Grays Harbor in the State of Washington. The Hoquiam River, a navigable stream, divides the city. The major portion of the city, where the property involved in this suit is located, known as West Hoquiam, contains the principal business houses. The opposite side, called East Hoquiam, is a residential district. Simpson Avenue extends through the center of this east side district from the east bank of the river in an easterly direction. Eighth Street, on the west side, is the principal business street.

For more than four years prior to September, 1908, the city, through its officers, was planning to extend Simpson Avenue across the river by a bridge and thence to connect it through the plaintiff's property with Eighth Street.

“It was generally understood * * * by the citizens of the town that the city would have to build a bridge at Simpson Avenue. In fact, the council about three years before instructed the engineer to make application to the War Department for a permit to put a bridge in there.” (P. 136.)

The connecting way between this bridge and Eighth Street would become a main artery of travel, whereas without the bridge the existing streets are off the line of travel and not adapted to retail trade. (P. 136.)

Prior to September 23, 1908, the Oregon and Washington Railroad Company began extending its lines into Western Washington and had created the defendant Grays Harbor & Puget Sound Railway Company, for the purpose of building a branch from Centralia to Hoquiam. J. D. Farrell was Vice-President of the Oregon and Washington Railroad Company and exercised general supervision over the Railway Company, whose affairs were directly handled by H. F. Baldwin, Chief Engineer, and J. B. Bridges, Vice-President and Attorney.

Shortly before September 25, 1908, these officers took up with C. H. Jones and George H. Emerson, President and Vice-President, respectively, of the complainant Lumber Company, the matter of terminal grounds and rights of way in Hoquiam. The complainant owned a large part of all the property desired. At the interviews a number of routes and sites of freight and passenger stations

were discussed. Street changes and street crossings were involved, requiring the action of the city, including provision for a highway bridge on the extension of Simpson Avenue.

“We said to Mr. Baldwin that any negotiations of this kind must be subject to the approval of the city in order to establish a highway bridge at that point, I mean a joint user bridge * * *. Mr. Baldwin stated that there would be no trouble.”

(Emerson’s testimony, p. 91.)

“I think it was, at all times, fully understood and so discussed between us that all we desired was a street crossing, and that there was no stipulation as to the kind of a bridge, other than that it was agreed to build a satisfactory bridge.” (P. 85.)

On this subject Mr. Jones testified:

“Our talk with Mr. Baldwin preceded that letter, and at that time we had before us the maps of the City of Hoquiam.

“Q. At that time was there anything said about a bridge across the Hoquiam River on Simpson Avenue?

“A. Yes, sir; that was the first talk. That was the way that we suggested it to Mr. Baldwin, that there would have to be a bridge across there; that we had always contemplated a bridge there and that the city needed it for its connection with East Hoquiam and the main part of the city. We always considered that and it was a part of the talk with Mr. Baldwin, that a bridge would have

to be across there, and talked about different kinds of bridges.

“Q. What was said on the subject?

“A. That there would be no objection to that; that it could be arranged very easily.”

(P.p. 101-102.)

These consultations were followed by the complainant's letter of September 25, 1908, set forth by copy on pages 5, 6 and 7. The description of the property which it was proposed to sell is given with sufficient accuracy for identification. The three alternative propositions will be seen by reference to the map to overlap each other in many places. The difference related chiefly to the depot sites. The Emerson proposition, which was finally accepted, involved crossing the river on the extension of Simpson Avenue and covered the purchase of the East Half of Blocks 61 and 62 and a part of Block 51, and obligated the Company to join in dedicating a fifty-foot street through the center of Blocks 61 and 62. Protection of the use of the log pond was also provided. After this proposition was written and delivered to the Railway Company, it appears that Mr. Farrell called the Lumber Company's attention to the omission of a provision for the release of damages for crossing tideland lots in front of Simpson Avenue, and the bridge approaches, which omission was supplied by the Lumber Company's letter of October 24, 1908.

Further negotiations seem to have been suspended until June 9, 1909, when Mr. Emerson and Mr. Jones, on behalf of the complainant Lumber Company, and Mr. Baldwin, Mr. Gordon, and probably Mr. Isaacs, the Railway Company's local engineer, were all present. Concerning that interview Mr. Jones testifies:

“Q. You may state what was said at that interview.

“A. That they were compelled to accept the proposition called the Emerson route, and there were a great many matters discussed at this time, and there was also the matter of the *bridge question*, which always entered into the whole matter and was one of the elements which was considered *when we were making prices* for the right-of-way and property that the railroad was to have.”

An effort was made by Mr. Baldwin to secure the reduction of the price which Mr. Jones had named, and finally Mr. Baldwin said he had a telegram from Mr. Farrell from San Francisco to close the deal for the right-of-way from the Northwestern Lumber Company “on the best terms we can.” (P. 103.)

The letter accepting the Lumber Company's so-called Emerson proposition was drawn up by Mr. Baldwin, signed by him in behalf of the Railway Company and Mr. Jones signed for the Lumber Company. By the terms of this acceptance the Railway Company agreed to pay to the Lumber

Company for the land covered by the Emerson proposition the sum of \$134,000. The document then reads:

“We will present you a map showing in detail such proposition, and a formal agreement shall be entered into pending actual transfers.

“However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.”

It is then provided that payment should be made within twenty days after delivery of abstracts showing good title to the property and upon delivery to the purchaser of proper deeds, and that all buildings should be removed within six months from date of deed. (P. 8.)

Mr. Baldwin, on whom Mr. Bridges depended to prepare the technical description to be incorporated in the formal agreement, died about June 20th. The abstracts had been delivered to Mr. Bridges on June 12th and showed satisfactory title. A formal agreement entitled to record was provided for by the memorandum probably because the transaction involved certain incidental matters collateral to the real estate trade, among others the construction across the Lumber Company's log pond, the obligation of the Company to join in the dedication of a street across part of the property to be purchased, and the clause providing that the

Lumber Company should co-operate in procuring other properties in Hoquiam and also franchises in Hoquiam. A franchise for crossing Ninth Street had been discussed, and undoubtedly other street crossings required by the Railway Company were contemplated. It could not use its property without them. It is manifest, however, that this co-operation clause was a collateral matter which entered into the inducement of the respective parties for making the deal, but it pertains to the consideration and is not of the substance of the primary contract, relating to the sale of land which does not depend upon these collateral stipulations for its legal validity.

After the death of Mr. Baldwin, Mr. Holman succeeded to his office. The parties met the first few days in July to prepare the formal agreement. Mr. Bridges had examined the titles and found no objectionable flaw. The matter of working out technical descriptions had been left to the Railway Company's engineers, which turned out to be a task, and there was delay probably attributable in part to the death of Mr. Baldwin. Mr. Bridges and Mr. Emerson worked out a draft of the formal contract, which was sent to Mr. Jones at Tacoma. The time of payment was for some reason extended to the first day of August, as shown by Section 5 of the proposed formal agreement, which seems to have been acquiesced in by all parties, except that \$20,000 was to be paid upon its execution. Every-

thing seems to have been satisfactory in the paper originally prepared by Bridges, except paragraph 7, which was the last paragraph of the document, when it reached Mr. Jones. This paragraph reads (p. 17) :

“It is agreed by the first party (Lumber Company) and their officers that they will co-operate with the said second party (Railway Company) in procuring such franchises of the City of Hoquiam *as it* (Lumber Company) *may desire,*” etc.

This clause as drawn by Mr. Bridges would have obligated the Lumber Company to acquiesce in any franchise desired by the Railway Company, no matter how destructive such franchises may have been to the interests of the city at large. In view of the understanding between the parties, as to the form of the bridge structure contemplated and to which the Lumber Company would give its approval in the City Council, Mr. Bridges' language was too broad. Mr. Jones requested the insertion of a further paragraph, which in the draft set forth in the complaint and signed by the Lumber Company modifies section 7. The first part of the added section 8 (p. 17) relates to the construction of the railroad so as not to interfere with the log pond. This part was acquiesced in as expressing the understanding of the parties. The last sentence of the proposed section 8, was objected to when the document was finally presented to the Railroad Company's officers for signature although when it

was drawn it was apparently acceptable. (P. 84.)

The original contract provided: "You shall co-operate in procuring franchises in Hoquiam." The scope of these franchises and consequently the extent of the co-operation promised as applicable to the plans assented to by Mr. Baldwin was understood when the memorandum was signed. In the formal provision for a highway bridge. In the formal agreement the Railway Company sought to have the language of the original memorandum changed to require the co-operation of the Lumber Company in procuring such franchises of the City of Hoquiam as it (the Railway Company) *may desire*. This language if accepted would cancel the entire verbal understanding so far as pertained to a highway bridge across the river. Mr. Jones sought to limit the scope of the seventh clause by inserting the following concluding sentence:

"It is further stipulated by the first party (Lumber Company) that such bridge *may* be a joint user bridge with the City of Hoquiam, provided the City of Hoquiam contributes its share of cost of construction and of maintenance."

It will be noted that the provisions relating to the track over the log pond in the first part of the proposed section 8 are mandatory and require the Railway Company to protect the use of the Lumber Company's log pond. The last sentence can in no way be construed as requiring the Railway Company to join the city in the building of a bridge,

but its only possible effect is a limitation upon the extent to which the Lumber Company will co-operate with the Railway Company in the securing of franchises. The franchise presented by the Railway Company to the city council "was just asking for a franchise to use portions of certain streets to extend their line through the town." (Mourant, p. 141.) This franchise was presented to the city council prior to June 30, 1909. The exact date does not appear, and in connection with that there was some discussion with the city about the bridge. (Brides' testimony, p. 159.) The city did not assume to have jurisdiction over the permit to build a bridge across the Hoquiam River, which is navigable, but it had jurisdiction over the streets and rights requested in the Railway Company's proposed franchise. That was the leverage the city was proposing to use to preserve the Simpson Avenue crossing for highway purposes. It was the desire of Mr. Jones to give the city free rein in that negotiation, and for that reason he declined to bind himself to co-operate in any franchise which the Railway Company might desire, giving the Railway Company exclusive use of that crossing. There was no suggestion or intimation communicated by any official of the Railway Company to the city authorities or the Lumber Company that a common bridge was not contemplated. The railway officers professed to acquiesce in the general proposition. There was, nevertheless, a suspicion that the Company might want to monopolize this crossing. Mr.

Mourant in his later negotiations with the city “got the impression that they were really opposed to it,” (p. 140), notwithstanding “they denied that they were opposed to a joint user bridge, that is, they denied they were trying to block the city from getting a crossing over the river.” (P. 141.) Mr. Holman says that he preferred an exclusive railroad bridge. His state of mind seems to have sifted through his professions and to have resulted in the suspicion of his sincerity. In a little city like Hoquiam, it is common knowledge that a matter of popular interest is a subject of general street corner conversation. When franchises were discussed with Emerson and Jones by Baldwin, the city’s bridge project was acquiesced in, and that acquiescence *apparently* continued through the entire history of this litigation, but the undertone of suspicion, which probably prompted the Lumber Company to be careful not to bind themselves to a course before the city council contrary to the understanding when the contract was made, was well founded.

Mr. Holman testifies that he did not give attention to the common user bridge clause when the contract was finally put in shape at the conference on July 7th, when he and Mr. Jones and Mr. Emerson were present, and when the contract was signed, and did not know that it was there. Mr. Gordon, the Right-of-Way Agent, was present but for some reason has not been called as a witness in this case. It seems rather strange that practically the only

matter in controversy between the parties should have escaped Mr. Holman's attention, but about a week later when he was going over the contract at Seattle, he concluded that the modification of Section 7, inserted at the instance of Mr. Jones at the conclusion of Section 8, was objectionable. Mr. Holman says: "As I looked at it, this agreement was made obligatory upon us to enter into agreement made it obligatory upon us to enter into an agreement with the City for a bridge." (P. 176.) It is difficult to see how Mr. Holman, with the advice of able counsel, could have taken that view of the legal effect of the clause insisted upon by the Lumber Company. He further says: "I also objected to a common user bridge. There were two objections; one, that it handicapped us in our negotiations with the City even if we agreed to a common user bridge; second, I objected strongly to a common user bridge * * *. I thought perhaps we could prevail upon the City to recede from their demands for a common user bridge. Personally, I did not know that Mr. Baldwin had promised about the common user bridge." (P. 177.)

Here is indicated a change of bridge plan after Baldwin died.

If he did not know *personally*, it would not have taken him long to find out. Looking back, we can see clearly that Mr. Holman, when he came into his position as Chief Engineer, succeeding Mr. Baldwin, did not share Mr. Baldwin's view as to

the desirability and unobjectionableness of a common user bridge. He conceived that he could accomplish his purpose of acquiring an exclusive crossing by getting the Lumber Company tied up by contract not to favor the City's side of the controversy, but on the other hand to co-operate with the Railroad Company in its effort to "prevail upon the City Council to recede from their demands for a common user bridge."

There is direct conflict of testimony between Bridges and Jones as to what took place when this clause was appended to section 8 of the formal agreement which was signed by the Lumber Company. Mr. Jones says it was inserted by Mr. Bridges without hesitation or objected when his attention was called to it. Mr. Bridges says it was inserted by Mr. Emerson, and that he referred the matter to Mr. Farrel, who objected to the clause. Apparently, Mr. Bridges, no matter who drew the clause, did not object until he had heard from Mr. Farrell. However, this part of the controversy we regard as immaterial except as tending to show that it conformed with Baldwin's understanding.. It is unnecessary to consider more than the uncontradicted testimony as to what took place during this important stage of the controversy. Mr. Jones testified:

"Q Did you state to Mr. Bridges any reason why you wanted that clause in the agreement?

“A It was,—we did not want to go on record in any other way. That was for the city and the railroad company as to what they should do. We wanted a bridge clause there, and we were only insisting that the city ought to have a right to say whether it wanted one or not, or to go in there with them, and we thought it would be no more than fair to have that clause in there. I did not want the city to think that we were against them.

“Q As I understand, you mean to say that you told him you did not want to be in a position to interfere with the city insisting upon a bridge across there?

“A We wanted it so it would be left to the city and the Railroad Company as to that, and we thought it was worded so that the Railroad and city should agree upon it.

“Q As I understand then, what you mean to say is that the substance of what you told him that you did not want to be in a position to interfere with the negotiations one way or the other between the Railroad Company and the city?

“A Yes, that is it. We wanted the city to act free and the Railroad also.” (Pp. 104, 105.)

The contract as set forth in the complaint was signed by the Lumber Company and forwarded on July 7th to the Railroad Company at Seattle. The letter of transmittal shows it was, the bridge clause included, acquiesced in by Mr. Holman (p. 84). The testimony of Mr. Emerson is corroborated by

the contemporaneous letter. Later, after hearing from Mr. Farrell, Mr. Bridges attempted to secure restoration of the document to the form as he originally prepared it.

Mr. Bridges, on July 16th, wrote to the Lumber Company as follows:

“Mr. Farrell, the General Manager of the Railroad Company, desires that this clause (above quoted) be stricken from the contract before it is signed by the Railroad Company. His position is that we are negotiating with the city of Hoquiam concerning the bridge rights, and he thinks that the matter of a common user bridge should be one to be left to adjustment altogether by the Railroad Company and the city. I so expressed myself to Mr. Jones, but at the same (time) he seemed to be of the opinion that the clause should remain in the contract.”

This is exactly what Mr. Jones was insisting on, but the change in the expression of that intent by striking out the modifying clause would have fallen far short of that mutual understanding and purpose. No change of language was requested by the Railway Company which attempted to express the understanding. Mr. Jones thought he had properly covered the point. If the Railway officials were acting in good faith it was their duty to suggest appropriate expression if they were dissatisfied, in place of attempting to gain an advantage.

The letter continues:

“We shall continue our negotiation with the

city concerning this matter and find out what disposition it has concerning the bridge, and will later advise with you about it. Meanwhile, we would like for you to consent to the clause quoted be stricken out, and if you will not so consent, then we ask that the matter may stand as it is until we can come to some definite arrangements with the city concerning the matter.” (P. 148.)

After the receipt of this letter, Mr. Emerson says he consented to allow the signing of the formal agreement to stand in obedience. Mr. Bridges further says:

“I had a conference with Mr. Jones in which I told him the Railroad people would not sign the contract with the common user bridge clause in it. That Mr. Farrell refused to approve it in that form, and asked him to cut it out of the contract. I explained to him that the Railroad Company had to go before the city council in order to get a franchise from the city and that such a clause in the contract it seemed to me was unnecessary for the protection of the city; that the city was in a position to protect itself and that such a clause would hamper us in getting our franchise. He said he must insist on that clause remaining in the contract, and refused to allow it to be stricken out. * * * I told him * * * that I understood the city was not in a position to pay its just proportion of a common user bridge, and if it were agreeable to the city not to have a common user bridge would he then cut it out? He said he did not understand the city would take any such position.” (Pp. 148-149.)

Here again we have the color of insincerity. The

contingency of the city being unable to pay was provided for by the objectionable sentence.

The instructions were, if modification by striking out the clause could not be secured, then to get indulgence of time for signing while the negotiation with the city was in progress.

The District Court apparently held that the conversations relating to the controversy between the parties subsequent to the signing of the memorandum and bearing upon the co-operation requirement of that contract negated the idea that the minds of the parties had agreed upon the matter in respect to which the parties should co-operate. He justifies this conclusion by pointing out that there was a dispute after the memorandum was signed as to the respective obligations of the parties pertaining to this co-operation in the procurement of franchises. The District Court in giving to this evidence the controlling weight which seems to have influenced his decision, overlooks the fact that whatever presumption might follow from such a dispute is overcome by the fact that Mr. Holman, who had charge of the subsequent negotiation of the phraseology of the formal contract, did not know what agreement Baldwin had made. He says, "I do not know what Mr. Baldwin did in his life time." (P. 177.) If he was not informed upon that subject, how could the fact that he was seeking to get more favorable terms throw light upon the scope of the original contract? The Court

further indicates that while this evidence of what occurred subsequently to the signing of the memorandum is competent to show that the parties' minds had not met when the memorandum was signed, that what occurred contemporaneously with the signing of that memorandum and prior to its signing is incompetent. This is exactly the reverse of the correct rule. The point in issue is to find out, first, whether the parties agreed, and then what they agreed upon.

Subsequent declarations might in a way reflect upon these issues if the person making the statement had knowledge, but where knowledge is disclaimed such subsequent declarations are entitled to no weight against direct and positive testimony as to what took place affecting the scope of the subject matter on which they agreed. The District Court shows that he dropped into this fundamental error by the authority which he cites and from which he quotes largely. (P. 70.)

It is perfectly clear that the Railroad Company officers, after Mr. Holman became Chief Engineer, were anxious to so shape the formal contract that the Lumber Company might be called upon to urge actively an exclusive railroad bridge. It is equally clear that at all times up to and including the signing of the memorandum on June 9th, nothing other than some arrangement which would admit of a street crossing was contemplated, and that the franchises would be so shaped that that result could be

brought about. Mr. Jones objected to putting his Company in a position where it might be compelled to oppose the city's plan and acquiesce in a request of the Railroad for an exclusive crossing. Consummation of the original contract, in so far as it pertained to the signing of the formal agreement, was postponed at the request of the Railway Company to give it the chance to negotiate with the city. This solution apparently conformed to the wishes and purposes of both parties. The Railway representatives would not be hampered before the council with the written consent of the Lumber Company to a joint bridge. The Lumber Company could not be called upon to co-operate to secure for the Railway an exclusive crossing.

But it was equally well understood that the postponement of the execution of the formal agreement by the Railway Company should not affect the substance and the potency of the original contract for the purchase and sale of the land. There was a telephone conversation between Mr. Bridges and Mr. Emerson on or about September 15th. At this time the formal agreement as signed by the Lumber Company and set forth in the bill of complaint was in Mr. Bridges' hands. It had not been signed by the Railwal Company on account of the circumstances above stated. Mr. Emerson requested Mr. Bridges to return the signed agreement.

“The withdrawal of the agreement was simply that it should be in our hands instead

of theirs.” (P. 86.)

He sent a messenger with the following note:

“Please deliver to the bearer the deed and any other papers that may be in your hands belonging to the Northwestern Lumber Company and connected with the right of way transaction pending between the Northwestern Lumber Company and the G. H. & P. S. Ry.” (P. 150.)

Mr. Bridges says he considered that, the Railway Company not having affixed its signature, the Lumber Company was entitled to be the custodian of the papers. There was no disagreement upon that point. Mr. Bridges, however, was determined that there should be no misunderstanding as to the effect of the return of the paper and that a record should be made “out of abundance of precaution.” Without repeating, we refer to the letter on page 21. Mr. Emerson says that the last sentence of Mr. Bridges’ letter:

“But by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property, but I anticipate that it is not your intention that the handing of these papers to you shall have that effect,”

correctly states their understanding. There is no disagreement upon that point. Both parties understood that the land described in the agreement had been sold by the Lumber Company to the Railway

Company at the price of \$134,000, to be paid within twenty days after the signing of the original memorandum on June 9th. The only open controversy pertained to the collateral matter of franchises, the Lumber Company holding out for the right, according to its understanding with Mr. Baldwin, not to co-operate in the passage of an ordinance which would block Simpson Avenue to the uses of the city for highway purposes, while the Railway was asking that the Lumber Company bind itself to co-operate in any plan it might propose. The upshot of the discussion, was acquiescence by the Lumber Company in the request of the Railway Company to postpone the execution of the formal agreement with the expectation that the city and the Railway Company, through the intervention of the Citizen's Committee, which had been appointed as an advisory board, would reach a conclusion satisfactory to all parties. It appears to have been equally the determination of both parties to carry out the terms of the original memorandum. Aside from the direct evidence that such was the intention and understanding, we have the conduct of the parties. The Railway Company consummated other purchases in harmony with its general plan, pursued its negotiations with the city to the point of agreeing upon a bridge which would accommodate both railway and highway traffic and finally recognized the agreement after the bridge plans had been settled by offering to pay the net price of the contract. The Lumber Company in the meantime proceeded to build

a new store, costing something over \$40,000, upon a street which the consumation of the railroad plans would change from a side steet to a main thoroughfare; by the removal of buildings from the tract sold, and other large expenditures amounting to something over \$5,000 more.

Mr. Bridges recognized the fact when he took up with the city council the subject of franchises that there was a determined purpose on the part of the citizens to secure a highway bridge at Simpson Avenue, in which he and other officers of the Company apparently acquiesced, although both he and Mr. Holman state that the Railway Company would have preferred an exclusive bridge. A Citizen's Committee was appointed, and after numerous conferences, and the lapse of a year and two months time, a combination structure was agreed upon and a memorandum signed. On that day, according to the undisputed testimony, Mr. Holman, who became Assistant General Manager, notified Mr. Jones that he was ready to settle up.

Mr. Bridges in his testimony says that he wrote the letter of September 25th, returning the signed contract, out of "abundance of precaution." In view of his prominence in the negotiations at every stage, and in view of Mr. Holman's final expressed desire to settle up according to what he believed to be the obligations of the memorandum of June 9th, the act of Mr. Bridges in the writing and delivering of this letter was

the act of the Company, if not by virtue of original authority, at least by virtue of adoption afterward.

Relative to what took place in the Company's office at Seattle after the bridge agreement had been reached with the Citizens' Committee on September 10, 1910, there is a substantial conflict of testimony. It is agreed that Mr. Jones went to the office in response to Mr. Holman's invitation for the purpose of settling up. Mr. Jones' account of what took place is to the effect that after Mr. Holman told him "we can now fix up with you," he thought the Lumber Company should have interest on the amount of the purchase price; that they had kept the Company out of their money so long. Mr. Holman refused to pay interest. Jones told him to think it over, and that was about the end of it (pp.107-108). The Lumber Company had been at all times ready to carry out their contract and had at all times held the property subject to the agreement. No particular amount of interest was asked for or demanded, and no computation was made (p. 108). Mr. Holman states that Mr. Jones demanded \$10,000 by way of interest in addition to the \$134,000 provided by the contract. This Mr. Jones flatly denies, and states that he simply requested interest. Mr. Bridges says that after more or less talk Mr. Holman said:

"Now, Mr. Jones, we are ready to take up this deed for \$134,000 and pay you for it, but we will not pay you any more." (P. 154)

He further says that the amount demanded by Mr. Jones was \$144,000.

“Q Did not he say that that was interest?

“A I am inclined to think that he said in answer to Mr. Holman’s question as to what that ten thousand dollars was for, that it was interest.

“Q Interest on the amount of the contract?

“A He may have said that. I would not not be positive about that. I am inclined to think he said it was interest.” (P. 164.)

“Q Mr. Holman did not notify them, then, that there was no intention to carry out the contract?

“A Mr. Holman said he would not pay anything more than \$134,000.

“Q But he did not say he would not carry out the contract?

“A Not in these words. The talk there was, Mr. Holman, representing the Railroad Company, was willing to (pay) \$134,000 for the deeds. They were not willing to deliver the deeds for that price.” (Pp. 164-165.)

After this consultation, Mr. Holmman took up with the city of Hoquiam details concerning the bridge at Simpson Avenue in pursuance of the agreement with the Citizens’ Committee, and all in line with the carrying out of that agreement. Several letters were exchanged, the last being dated

October 3, 1910, (pp. 188-191, inc.). Mr. Holman, in explanation of these letters, says he intended to make such changes in the terminal plan at Hoquiam that the Railroad Company would have been enabled to avoid part of the property of the Lumber Company contracted for, but after September 10, 1910, he never had any interview or conference with the complainant Company or its officers.

All of the officers of the complainant state that during the months of September and October following they were actively going ahead constructing a new store building which had previously been started preparatory to vacating the old store, which was on the ground sold to the Railway Company, and removing other structures as they had agreed and otherwise preparing to carry out the contract. That all this work was under the eye of officials of the Railway Company, and that notwithstanding this, their first knowledge that the Railway Company had made other arrangements for entering Hoquiam was in the following May, when they saw in a newspaper that a contract had been made for the use of the Northern Pacific terminals. Immediately after this the Lumber Company took legal steps looking to the enforcement of the contract.

LAW POINTS AND ARGUMENT.

Defendants, in the court below, took the position that the sentence appended to the contract at

the instance of Mr. Jones, representing complainant, enlarged the obligations of the Railway Company as contained in the June memorandum. The carefully selected words employed clearly show that the clause was intended to be permissive and not to impose an obligation. Mr. Jones so explained. Litterally the appended sentence objected to by the Railway Company goes no further than to express the consent of the Lumber Company to the building of a joint bridge at Simpson Avenue. It fairly expresses in connection with paragraph 7 that neutrality in the pending negotiations between the city and the Railway Company which Mr. Farrel says is all he wanted. Mr. Holman seems to have wanted more, but Farrel knew and Holman did not know what Baldwin had agreed to respecting this bridge. The objection was captious. The request to strike out the modification of the unlimited obligation proposed by Bridges was unwarranted.

We concede that the Lumber Company had no right to limit the scope of its obligation ascertained by the aid of all that took place showing the nature of franchises contemplated, but we contend that the Lumber Company had the right to qualify the attempted enlargement of its obligation so that the formal document should conform to the intention of the parties when the memorandum contract was made. The parol evidence clearly shows it was never the intention of the Lumber Company to aid the Railway Company to procure franchises which

would close this river crossing to highway traffic.

The District Court held, apparently, that the evidence showing the bridge plans contemplated which involves the scope of the franchises required to carry out those plans was incompetent on the ground that such evidence is within the statute of frauds and also in conflict with the general rule that parol evidence will not be received to vary the terms of a written instrument. This was the primary error of the District Court.

The Statute of Frauds has no bearing upon the competency of this testimony. The written memorandum in connection with the letter proposition to which it refers, fulfills every requirement of the statute. The franchise co-operation clause is an incidental promise to be performed after the consummation of the sale. This promise is at best of one of the considerations which induced the purchase.

Courts have uniformly held that the amount, scope and character of the consideration of a deed or other instrument may be shown by parol.

Windsor vs. Great Northern Ry.

37 Wash. 156. In this case the plaintiff, Windsor, had sold to the Railway Company a strip of land for right of way purposes, and had made an ordinary deed therefor. The suit was to recover damages for failure of the Railway Company to fence the right of

way which it had agreed orally to do as part of the transaction. The court allowed the agreement to fence to be proved by parol and on appeal the Supreme Court held that the evidence was properly admitted. In the opinion it is said:

“It is well established that oral testimony may be introduced to show consideration additional to that expressed in the contract.”

citing *Kickland vs Menesha Woodenware Co.*, 68 Wis. 34, where it is said: “It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was and to show that the same or some part of it remains unpaid though not thereby to impeach the title conveyed by the deed;” further citing *Shepard vs. Little*, 4 Johns 210, wherein it is said: “Although you cannot, by parol, substantially vary or contradict the written contract, yet these principles are inapplicable where the time or amount of the consideration becomes a material inquiry.” The case further decides the important proposition, applicable to the case at bar, that a corporation cannot accept a part of the benefit of a transaction and deny its agents authority as to any collateral obligations which were an inducement to the transaction.

In *Rishardson vs. Travers*, 112 U. S. 423, in passing upon the admissibility of parol evidence showing consideration for a deed collateral to those

expressed in the document, Mr. Chief Justice Waite said:

“It is elemental learning that evidence may be given of a consideration not mentioned in the deed, provided it is not inconsistent with the consideration expressed in it. I Greenleaf, Evidence, 286; II Phil. Evidence, 353.”

A clear statement of the rule permitting parol evidence is made by Judge Summers in *Seely vs. Cunningham*, 81 Ohio State, 219:

“That the consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, creating a right or extinguishing a title, but that for every other purpose it is open to explanation by parol proof, and is prima facie evidence only of the amount, kind and receipt of the consideration is settled by the almost unbroken current of American decisions.”

The able review of authorities which follows this quotation sustains beyond question the rule stated by the learned judge. The annotator of this case in 25 L. R. A. (n. s.) 1195, exhaustively digests the cases.

The court below in the case at bar construed, without considering the parol testimony, the words “you shall give us your co-operation in procuring * * * franchises in Hoquiam”, as equivalent to the words used in subdivision 7 of the contract prepared by the Railway Company, to-wit: “such franchises as the Railway Company shall desire in

Hoquiam.” It certainly was not the intention of the parties to co-operate in procuring every kind and character of franchise on any subject which might possibly be placed before the City Council. The evidence tends to show the scope of the subject matter in the minds of the parties, and in this respect is like the contract in the case of *Donner vs. Alford*, 136 Fed. 750, where evidence was admitted and the case, being one triable before a jury, submitted to the jury covering the “question as to what a written contract on its face and in its terms actually covers and as to what subject matter it applies.”

The franchises contemplated were such as would cover the plans of construction contemplated when the memorandum was made. What were those plans? The memorandum does not say with reference to the bridge. The wording proposed in the Bridges draft would cover every change of plan the Company might make with every change of Engineer. The parties never so agreed. Both Farrell and Jones refute any such intention.

It is not necessary to go beyond the decisions of this court to sustain the introduction of the testimony showing the scope and character of the franchise contemplated by the parties with respect to the bridge.

North American Transportation Co. vs. Samuels, 146 Fed. 48.

Lilienthal vs. Cartwright, 175 Fed. 580.

In the North American Transportation case this court permitted the introduction of testimony affecting a written contract and summarized the legal principle in the following language:

“Upon an examination of the authorities bearing upon the legal principles applicable to this case, we find that the courts have held that where in the application of a contract to its subject matter an ambiguity or uncertainty arises, it cannot be removed by an examination of the agreement alone: parol evidence of the circumstances under which it was made and of statements made in the negotiations which preceded it may be admitted to resolve the ambiguity and to prove the intention of the parties (Kirby Mfg. Co. vs. Hinchman-Renton F. P. Co., 132 Fed. 957; Davies vs. Pierce, 39 So. 488); that it is competent to show all the transactions at the same time between the parties, only part of which is in writing (Chemical Co. vs. Moore, 61 S. C. 166; Graffam vs. Pierce, 143 Mass. 386; Sultan vs. Griebel, 118 Iowa, 78, and authorities there cited) * * * ; that where a written instrument executed pursuant to a prior verbal agreement, does not express the entire agreement or understanding of the parties, it is competent to show by parol testimony what the real contract was (citing numerous cases) * * * ; that parol evidence is admissible where it tends to prove an independent collateral fact about which the contract is silent (citing cases).”

We are at a loss to understand by what logic the District Judge, formed his conclusion that the parol evidence offered in the case at bar should not

be considered in view of this compelling authority so clearly applicable to the case at bar.

In *Sultan Railway & Timber Co. vs. Great Northern*, 58 Wash. 604, the contract consisted of a letter written by the defendant's traffic manager to the plaintiff's President, the first sentence of which was as follows: "Referring to the matter of hauling *your timber* from Sultan Junction to Snohomish" etc. One of the controversies in the suit involved the extent of the timber covered by the contract. In the course of the opinion it is said:

"By referring to the letter before set out it will be noticed that the writer of the letter when speaking of the timber to be hauled under the contract refers to it as 'your timber.' It is argued by the appellant that this phrase limits the timber agreed to be shipped to the timber owned by the appellant at the time the contract was entered into, which amounted to some fifty million feet, and that since that was all shipped before the alleged breach on the part of the Railway, the contract has been performed. We think, however, the evidence makes it clear that the contract to haul did not refer to timber then owned by the respondent but to such timber tributary to the junction named as the respondent should tender for shipment. This is made clear by what took place at the meetings of the parties while the contract was being negotiated. It is shown that at these meetings the entire matter was gone into; that the respondent not only made known its then holdings and its outstanding contracts of purchase, its purpose to acquire other timber properties and to continue its logging

business at this point as long as it found it profitable, or until the timber tributary should be exhausted. When, therefore, the Railway official used the term 'your timber' in setting out the contract, he must be held to have meant the timber concerning which the parties were negotiating, and not the specific quantity then owned by the respondent."

In this case objection was made to the testimony offered on the ground that the subject matter was covered by the writing.

The case at bar is clearly distinguishable from a line of cases which hold that parol proof will not be permitted to impose upon either party burdens and obligations not fairly within the scope of the written contract as understood and interpreted in the light of the circumstances surrounding its execution where the statute requires such additional obligation to be in writing. The provision for which the Lumber Company contended, fairly construed in the light of the circumstances, limited its obligations to the original understanding, but in no sense imposed any additional burden upon the Railway Company. Upon cross-examination of Mr. Jones, counsel attempted to have him say that the limitation insisted upon by him was meaningless and might just as well have been omitted. He does say in substance that it looks as if it might just as well have been omitted. This answer must be read in the light of his whole testimony and in the light of the conclusion reached between the Railway Com-

pany and the City, by the terms of which it was agreed to build a joint bridge. In view of what actually occurred afterwards, the clause insisted upon became immaterial, but in view of the suspected though secret purpose of Mr. Holman to effect a different result with the City, when the formal paper was being prepared, the provision insisted upon by Mr. Jones was very material at the time, for otherwise the Lumber Company would have been bound, under Section 7 of the proposed contract, to take a position in opposition to the City.

It is our contention that the complainant, in insisting upon the sentence appended to the contract, called the "Bridge Clause," insisted only upon that which by the contemporaneous interpretation put on the memorandum by both parties, towit neutrality and not alliance, was intended. The wording of the latter part of the sentence, "*provided the City of Hoquiam contributes its share of the cost of construction and maintenance,*" shows that the Lumber Company was not attempting to dictate to or make obligatory upon the Railway Company the building of a common user bridge. That the word *may* was not used in the sense of *shall* is negatived by the testimony. A court will never by construction substitute one word for another unless it is necessary so to do to carry out the intention of the parties.

It may be said that Jones did not explain to Bridges that he recognized the full importance of the joker in paragraph 7 of the formal contract

prepared by Bridges. Bridges apparently recognized the justice of the modification suggested to him by Jones, it matters nothing who did the writing. Subsequently when he heard from Holman and Farrell he did not attempt to secure any modification of the language of both sections so as to express more clearly the agreement, but contented himself with presenting Farrell's request to cut out this last sentence. If it had complied the Lumber Company would have been tied hand and foot.

The request was not based upon the ground that the contract as signed did not express the agreement made through Baldwin. What they asked was a change of that agreement.

When the Lumber Company refused to bind itself to any arbitrary request the Railway Company might make, Mr. Bridges requested that the point of disagreement remain open and that the Lumber Company forbear the execution of the formal contract by the Railway Company pending negotiations with the City Council. Such forbearance was granted, and it was the understanding of both parties, as shown by the letter of September 15th, that the original memorandum of agreement should not be affected thereby. We contend that this letter which, according to the undisputed testimony of Mr. Emerson, stated the understanding of both parties as the same was reached over the telephone, amounted to a confirmation of the original memorandum by the Railway Company and a waiver of

the point in dispute providing eventually that the City Council and Railway Company should agree upon the terms under which a joint bridge should be built. That agreement was reached in September, 1910. In the meantime the original memorandum was in full force and binding upon both parties.

The Railway Company in this litigation has attempted to belittle the letter of its Attorney and Vice-President by the claim that he was simply the attorney and officer of a subsidiary corporation, subject to the dictates of Mr. Farrell, the Vice-President and General Manager of the proprietary corporation. The record discloses Mr. Bridges' hand at every stage of this whole negotiation. He was present every time anything of importance was done, and in conjunction with the Chief Engineer, first Mr. Baldwin and then Mr. Holman, had charge of the whole negotiation. It was to him that Mr. Farrell communicated his objections to the contract signed by the Lumber Company, with the request that the objectionable sentence be cut out, and if it could not be cut out then to secure the Lumber Company's indulgence while the matter was pending in the City Council. Under those circumstances the Railway Company ought not to be heard to question Mr. Bridges' authority to protect its rights by reserving in clear and explicit language the binding effect of the memorandum agreement.

Upon this point the case of *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, is instructive, as well as

the Windsor case hereinbefore referred to. In the Anderson case it is said:

“When a corporation allows certain officers to manage its business, particularly as here, such as President, Vice-President and Superintendent, it must be responsible for their acts unless it affirmatively shows that they were unauthorized.”

The record shows that Mr. Farrell was in intimate touch with what was being done at Hoquiam with reference to this terminal situation. He at one time appeared before the City Council, and he knew that the formal document which the Lumber Company had signed had not been signed by the Railway Company. He must have known in conjunction with other officers that the Lumber Company was going ahead and spending money on the assumption that the original memorandum was a binding agreement. It appears that he, as well as Mr. Holman, was personally consulted by the Lumber Company's officers about some features of the proposed construction of the tracks and the accessibility of the side-track to the new store, which could only be used in case the terminal plan was carried out. (Pp. 124, 125.)

It is our contention that the Railway Company ought to have signed the agreement executed by the Lumber Company on July 7th, which definitely fixed the date of payment as well as some incidental obligations contemplated by the original memorandum, including construction across the mill pond

and dedication of a portion of the street proposed over the property to be conveyed. The request of the Railway Company for delay in the execution of this agreement under the circumstances of the case ought not to act to the prejudice of the Lumber Company and the forfeiture of its right to have interest.

THE DEFENSE OF TENDER.

It was contended on the trial in the District Court that on the 10th of September, 1910, after an agreement had been reached between the Railway Company and the City Committee respecting the bridge, that the Railway Company offered to comply with the requirements of the contract of June 9, 1909. The record shows that up to this time both parties had recognized the existence of a binding contract, notwithstanding the failure of the Railway Company to execute the formal contract. On the part of the Railway Company this recognition is shown by the Bridges letter of September 15, 1909, the talks between Holman and McGlaughlin, the Mill Company's Manager, and a member of the City Committee, at numerous times (pp. 124, 125), and finally the declaration of Mr. Holman to Mr. Jones that he was ready to take up the deeds. On the part of the Lumber Company it is shown that the agreement was recognized by its extensive preparation at large expense to comply and frequent conferences with officers of the Railway Company concerning the location of buildings,

spur tracks and other incidental matters.

By the terms of the original contract the price of the property, \$134,000.00, was payable twenty days after the delivery of abstracts. The record shows that these abstracts were delivered on the 12th day of June, 1909, making the date of payment about July 1st. When the formal contract was being prepared the date of payment was specifically fixed at \$20,000.00 upon the execution of the document and the balance on August 1, 1909. (Pp. 10, 16.) The formal agreement to which the Railway Company assented in all respects, except the last sentence of Paragraph 8, is conclusive evidence that a specific date for payment was reached to take the place of the time provided in the original memorandum, and that the making of deeds and payment should be concurrent acts (5th clause, p. 16).

We do not contend that the obligation to pay the price of the purchase on August 1st, 1909, arises out of the terms of the unsigned formal contract. It is based upon the original contract as modified and made specific by the subsequent oral agreement, which oral agreement is evidenced by the unsigned document in connection with the evidence that the date therein expressed was agreed to as mutually satisfactory.

There is a sharp dispute as to exactly what took place in Mr. Holman's office on September 10th when he claims that he offered to comply with the

existing contract. The dispute relates more to detail than to the essential points. Upon the essential points it appears without dispute that Holman recognized the binding effect of the contract but declined to pay any interest and declared that he would not pay any sum beyond the principal of \$134,000.00. Mr. Jones, upon the other hand, declined to accept \$134,000.00, stating that he was entitled to interest. The conflict consists in the statement of Holman and Bridges that Mr. Jones demanded \$10,000 by way of interest, and the statement of Jones that he never named any amount and wound up the controversy by asking Holman to think it over or talk it over with his superiors, or words to that effect. No computation of interest was made at that time, but the amount due was approximately \$10,000. Mr. Holman and Mr. Bridges both admit that Mr. Jones' demand was for interest, and if we assume for the sake of the argument that he said \$10,000, the slight error of a hasty mental computation should not operate to his prejudice, especially in view of Mr. Holman's positive declaration that he would not pay any interest. A fair reading of the testimony shows that the dispute was concerning the payment of interest and not the amount. Mr. Holman says that the controversy ended by his declaring the deal off; Mr. Jones says that the controversy ended by the request that he made of Mr. Holman to think it over and consider as to whether or not the Lumber Company was not entitled to interest. On this point Mr. Jones' version

is borne out by the circumstances. The store building had a short time before been commenced. The work of removing buildings from the property had been partly accomplished. Leases had been cancelled, and in general compliance with the contract was in progress. Shortly after this talk the work on the new warf required for adapting the Lumber Company's property to the new conditions was commenced. The Railway Company's local engineer was on the ground and must have seen this work going on (pp. 124-5-6). The letters written by Mr. Holman and the City Engineer the latter part of September and early in October disclose no purpose of the Railway Company to abandon the project as outlined on their map attached to the Lumber Company's contract. The Lumber Company did assume and had a right to assume that the amount to be paid according to the provisions of the contract would be settled in due time. The matter in dispute was one capable of prompt adjustment if the parties could not agree.

Is it probable that Mr. Holman during the short heated argument with Mr. Jones on the afternoon of this 10th day of September, without consultation with Mr. Farrell, who had entire ultimate charge of the property of the Railway Company, suddenly came to the conclusion to change the entire terminal plan in the important city of Hoquiam, including the location of depots, freight yards and other facilities for doing business in that city? Is it not more

probable that it was not until months afterwards when the arrangement was made with the Northern Pacific that this resourceful gentleman abandoned the contract with the Lumber Company. If it be true, as he says, that while this controversy with Mr. Jones was in progress on a moment's notice he changed the plan along which he had deliberately worked for two years, it was not fair afterwards for him to keep that purpose to himself, to mislead the Lumber Company by continuing to perfect his bridge plans and by allowing the Lumber Company to continue to spend money in preparation for the contract. This whole project had proceeded leisurely and consistently along the lines of the contract for two years. The Lumber Company had no reason to suspect any change of plans. Now the very indulgence solicited by the Railway Company and granted by the Lumber Company is set up as an equitable defense against the Lumber Company's claim.

The defense of tender is not tenable for the reason that the Railway Company through Mr. Holman did not offer to the Lumber Company the money consideration provided by the contract. The interest from the date of payment agreed upon subsequent to the original memorandum and at the time when the formal agreement was being put in shape amounted on the 10th of September, 1910, to something over nine thousand dollars. Mr. Holman definitely declined to pay any interest. It cannot

therefore be claimed that he tendered such performance of the contract as would avoid its obligation. The postponement of a formal contract did not change the date of payment agreed upon.

The Washington statute relating to interest provides:

“Every loan or forbearance of money, goods or thing in action shall bear interest at 6%,” etc.

(Rem. & Ball. Code & Stat. Sec. 6250.)

The Railway Company cannot claim a rescission of the contract without an unconditional offer to fully comply, accompanied by an unconditional offer of the money due under the contract, and thereafter a refusal by the Lumber Company to comply on its part. This offer should have been made in such a way as to have enabled the Lumber Company to accept the amount offered and sue for the difference between the amount paid and the amount claimed.

In the case of *Willard vs. Taloe*, 8 Wall. 557, specific performance was resisted on the ground that the purchaser offered to pay in notes of the United States. It was contended that the agreement contemplated payment for the property in gold. Mr. Justice Field said:

“The kind of currency which the complainant offered is only important in considering the good faith of his conduct. A party does not forfeit his right to the interposition

of a court of equity to enforce a specific performance of a contract if he seasonably and in good faith offers to comply and continues ready to comply with its stipulations on his part although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required."

This well reasoned case sustains our proposition that even if Mr. Jones may have been mistaken as to the amount due the Lumber Company, if he was ready and willing to convey, as the proof shows he was, his Company should not be subjected to a forfeiture of the contract and the loss of what it spent in preparing to perform the contract by reason of mistake.

Pomeroy's Equity Jurisprudence, Sec. 848.

Morgan vs. Bell, 3 Wash. 554.

"The debtor has no right to the benefit of a tender as having the effect of payment when it is burdened with such a condition that the creditor cannot accept the money without compromising his legal right to recover the further sum which he claimed to be due." *Moore vs. Norman*, 18 L. R. A. 359; 52 Minn. 83.

This statement of the court, coupled with abundant citation of authority, is the rule almost universally applied. It is founded upon the doctrine that a party who honestly believes he is entitled to a right cannot be deprived of resort to the courts for an adjudication of that right at the peril of for-

feiting that which is not in dispute.

The Lumber Company, before delivering the deeds which Mr. Holman said he was ready to take up, was entitled to a formal contract capable of record expressing the Railway Company's obligation to dedicate the street specified in the proposition of sale and also the obligation to protect the use of the log pond. While these were independent covenants to be performed after the consummation of the sale, in view of the stipulation that these covenets were to be formally executed prior to the transfer of the land, a transfer without providing for the covenets might be construed as a waiver.

The Railway Company and City had settled and the object of forbearance in the signing of a formal agreement had ceased. It was now the first duty of the Railway Company to attach its signature to the formal contract already signed by the Lumber Company. If that document was not technically in the form required by the signed memorandum, then the Railway Company should have tendered a substitute. If an agreement as to form could not have been reached, either party had a right of action against the other. This action is in effect to compel the execution of this first step under the signed memorandum, or in view of what has happened since to secure appropriate substitute relief.

The defense of laches is not available on the

ground that the Railway Company has entered into other arrangements for terminals, because it nowhere appears that the Lumber Company ever had any notice or reason to believe that the Railway Company contemplated entering into such other arrangements. On the other hand, the Railway Company should be estopped from claiming a rescission of the contract because it permitted the Lumber Company to go ahead and spend approximately \$40,000, with full knowledge that such expenditure was in pursuance of the contract and would be almost wholly wasted if the plans of the Railway Company were not carried out. The evidence shows that while these expenditures were commenced prior to the attempt to settle on September 10, 1909, they were pursued with full knowledge of the Railway Company for many months thereafter.

HARDSHIP OF THE REMEDY SOUGHT.

The three defendants, Grays Harbor & Puget Sound Railway Company, Oregon & Washington Railroad Company, and Oregon-Washington Railroad & Navigation Company, are bound by the covenants with each other, shown by the respective deeds of transfer, to the obligations of this contract. It was argued in the court below that the remedy of specific performance would under the circumstances of the case impose upon the defendants such hardship that a court of equity ought not to grant the relief. Judge Rudkin in passing upon the demurrer to the complaint intimated that he would

hesitate to enter a decree to the full extent of the prayer of the bill. He nevertheless overruled the demurrer in which order it appears that he considered the complainant entitled to relief.

The defense of hardship is not available to the defendants for the reason that the situation has resulted from its wrong, and is not in any respect attributable to the conduct of the complainant. If great hardship upon a party charged with the obligations of the contract were attributable to the party seeking performance or to circumstances over which the obligated party had no control, the case would be different. We know of no case where the court has declined specific performance on the ground of hardship where the contract has been abandoned by the party obligated simply because some other arrangement became more advantageous, and this is especially true where performance does not involve anything beyond the payment of the money consideration promised by the contract. If it involved a continued hardship, the case would be different.

Frye on Specific Performance, Sec. 258.

Storer vs. Great Western Railway, 2 Young & Collier Chancery Reports, 48.

Pembroke vs. Thorpe, 3 Swanstons'c Chancery Rep. 482.

Hawkes vs. Eastern Counties Ry., 22 Chancellor's Rep. 739.

Where the remedy of specific performance can be accomplished by the payment of money, the decree will so provide.

Taylor vs. Insurance Co., 9 Howard, 390, 405.

Eames vs. Insurance Co., 94 U. S. 621.

Specific performance will be granted at the suit of either party to a real estate contract.

“The right of the vendor to go into a court of equity and enforce specific performance is unquestionable. Such subjects are within the settled and common jurisdiction of the court. It is equally well settled that if the jurisdiction attached, the court will go on to do complete justice although in its progress it may decree on a matter which was recognizable at law.”

Cathcart vs. Robinson, 5 Peters, 277.

The defendants ought not to be heard to plead hardship as a defense to the complainant's suit of specific performance without an offer on their part to do equity, which would involve restoration to the Lumber Company of what it has lost through the breach of the contract. If a contract existed and was terminated by the Railway Company because it found an opportunity to make a more advantageous arrangement, common justice would seem to suggest restoration to the Lumber Company of what it has lost. The court having jurisdiction over the subject matter which is cogniz-

able in equity has jurisdiction to determine and grant relief according to the circumstances of the case, under Equity Rule No. 23. This action was maintainable as a suit in equity upon the refusal of the Railway Company to sign the formal agreement which it agreed to execute. The obligation flowing out of the original memorandum of June 9th running from each party against the other existed as soon as that memorandum was signed, and immediately upon its breach by either party an action for performance arose at the suit of the other. Any controversy as to the scope of that agreement would have been settled if suit had been brought at that time, and it is now within the jurisdiction of this Court to settle the dispute at this time. Both parties held fast to the terms of the memorandum, notwithstanding postponement, through the expectation that the controverted point would become immaterial. The controverted point did become immaterial and the cause of action which arose upon the refusal of the Railway Company to sign the agreement remained in existence and became the basis of this suit. If the Lumber Company arbitrarily insisted upon a formal contract to which it was not entitled, we concede that equity ought not to help it now unless the Railway Company waived its technical rights and acceded to the claim of the Lumber Company, which would amount to a modification *pro tanta* of the original memorandum. If therefore the Lumber Company was right in the original dispute about the terms of

the formal agreement, it is entitled to a decree. If the provision inserted by the Lumber Company was to qualify a provision inserted by the Railway in the formal contract so that the two together would express the scope of the original memorandum as the parties understood it when the memorandum was made, then we are entitled to a decree. If an honest dispute existed between the parties as to the interpretation of the original memorandum in the light of the circumstances under which it was executed, or as to the language used in the formal agreement to express that understanding, and if by subsequent agreement the settlement of that dispute was postponed until negotiations between the Railway and the City might determine whether the dispute was material or otherwise, then when the dispute became immaterial through the adjustment with the City, the Lumber Company was entitled to have the contract signed carrying out in all respects the agreements and stipulations of the original memorandum.

There is a broad distinction between a negotiation looking forward to an agreement which is never consummated and a dispute over the scope and meaning of an agreement which has been reached. A dispute about the construction of an agreement or the scope of its terms may be the subject of litigation having for its object the determination of the rights of the respective parties under the agreement. The court in that case will determine

the fact as to what the agreement is and the decree will construe and determine disputed points. Where a matter has not passed beyond the stage of negotiation and where no enforceable agreement has been reached, the Court will not attempt to make an agreement for the parties and the suit will be dismissed. Or where an agreement has been reached and when the parties come to carry it out they abandon the agreement reached and try to make a new one, the case stands just where it would have stood had no agreement ever existed. The case quoted from by the District Court illustrates the point.

The court below seems to have lost sight of this distinction. Here a valid, enforceable agreement existed between the parties. Either party had the right to move against the other. The existence of a dispute as to the scope of the subject matter or the construction of the terms of the writing was no defense against the power of the court to determine what the parties had agreed upon and to enforce their agreement. Mere postponement of the time of settling a dispute arising out of an agreement will not change any right existing under the agreement.

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